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Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties

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CHINESE FOREIGN DIRECT INVESTMENT INTO AFRICA IN THE CONTEXT OF BRICS AND SINO-AFRICAN BILATERAL INVESTMENT TREATIES

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China is now the second largest economy in the world after the United States of America[1] *and is deemed to be the most influential member of the group of leading emerging economies, the so called BRICS partnership consisting of Brazil, the Russian Federation, India, China and South Africa. According to the latest World Investment Report published by the United Nations Conference on Trade and Development ("UNCTAD"), China is also the second largest recipient of inward foreign direct investment ("IFDI") and the third in terms of outward foreign direct investment ("OFDI").*[2] *In this context, Africa is emerging as an important destination for China's FDI outflows.*[3] *Through an interdisciplinary approach, this article seeks to further our understanding of the economic, political and, more importantly, the legal framework that underlies these current developments. The article first of all provides an overview of China's current Africa policy with regards to investment. Also, the role of BRICS is scrutinized in this context. In its main part, the article then refers to the international law governing*

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[1] Taking into account the countries' nominal GDP and respective shares of global nominal GDP. *See* UN Statistics Division, *National Accounts Main Aggregates Database*, http://unstats.un.org/unsd/snaama/dnllist.asp (last updated Dec. 2013).

[2] United Nations Conference on Trade & Dev., *World Investment Report* 2013, at xiv, xv (2013), *available at* http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

[3] United Nations Conference on Trade & Dev., Asian Foreign Direct Investment in Africa 56 (2007), *available at* http://unctad.org/en/Docs/iteiia20071_en.pdf (2007); UNITED NATIONS CONFERENCE ON TRADE & DEV., GLOBAL INVESTMENT TRENDS MONITOR (2013), *available at* http://unctad.org/en/PublicationsLibrary/webdiaeia2013d6_en.pdf.

FDI. A special emphasis is put on bilateral investment treaties that have been concluded between China and Africa. Finally, this article evaluates the political and legal framework of the Sino-African investment relations, taking into account various aspects ranging from environmental concerns to human rights aspects, labour issues, and economic development. Again, the bilateral investment treaties are analysed in more detail.

INTRODUCTION

While commercial relations between China and Africa have been in existence for quite some time, it is the scale and pace of China's trade and investment flows that is particular about the current Chinese commercial activities in Africa.[4] In addition, recently, the BRICS partnership consisting of Brazil, the Russian Federation, India, China and South Africa became of special importance for the Sino-African relationship. In fact, trade between the BRICS countries and the African continent has been rising constantly, doubling since 2007 to $340 billion USD in 2012, and is projected to reach $500 billion USD in 2015.[5] To put in context, this means that the BRICS countries (accounting for a combined 24%) surpassed the U.S. (17%) as Africa's second biggest trading partner, falling only behind the European Union ("E.U."), which remains Africa's largest trading partner with 34% of the total exports.[6] BRICS countries in general are forming an increasingly influential network with a growing impact on international political and economic governance. The cooperation of BRICS members with one another and with African nations thus provides an enormous potential for development in the future.

Traditionally, China was seen as a host country for direct foreign investment, rather than being the source of it.[7] But recently, Chinese OFDI rose significantly in absolute terms, but also relative to FDI.[8] Starting with an outward FDI flow of $2.5 billion USD in 2002,

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[4] Harry G. Broadman, *Chinese-African Trade and Investment: The Vanguard of South-South Commerce in the Twenty-first Century* 87, *in* CHINA INTO AFRICA (2008) (Robert I. Rotberg ed.).

[5] United Nations Econ. Conference for Afr., *Africa-BRICS Cooperation*, at iii, *available at* http://www.uneca.org/sites/default/files/publications/africa-brics_cooperation_eng.pdf.

[6] *Id.* at 10.

[7] *See* Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making*, AM. SOC'Y INT'L L. 5 (2008), *available at* http://www.diegdi.de/publikationen/mitarbeiter-sonstige/article/chinas-new-bilateral-investment-treaty-programme-substance-rational-and-implications-for-international-investment-law-making-1/.

[8] Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agree-*

there was a massive increase to $21.1 billion USD in 2006, with a steady growth almost edging up to $85 billion USD in 2012,[9] making China the largest OFDI investor among developing countries.[10] In 2012, China's OFDI stock in Africa reached $21.23 billion USD.[11] Looking at the FDI flows from 2009 to 2012, "China's direct investment in Africa increases from $1.44 billion to $2.52 billion," which represents an annual growth rate of 20.5%.[12] This makes Africa the fourth most important destination of Chinese OFDI after Asia (Hong Kong), Latin America, and the Caribbean (the British Virgin Islands and the Cayman Islands),[13] leaving behind North America and Europe.[14] South Africa is the largest recipient of Chinese OFDI in Africa, followed by Sudan, Nigeria, and Zambia.[15] In 2012, China's OFDI stock in South Africa alone reached $4.6 billion USD.[16] However, most investment flows to Africa still come from Africa's traditional foreign investors like the United States, Japan, and Europe.[17]

Africa as a place of investment still remains one of the least developed regions in the world. Therefore, potential investors have to be prepared to deal with such obstacles as underdeveloped market institutions, a shortage of skilled workers, constraints on business competition, and weak governance, which is even more aggravated by the

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ments? (German Dev. Inst., Discussion Paper No. 7, 2013), *available at* http://www.die-gdi.de/discussion-paper/article/investment-rules-in-chinese-preferential-trade-and-investment-agreements-is-china-following-the-global-trend-towards-comprehensive-agreement.

9 United Nations Conference on Trade & Dev., *FDI Statistics*, http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx (last visited Feb. 28, 2014).

10 Wang Duanyong, *China's Overseas Foreign Direct Investment Risk: 2008–2009* 5 (S. Afr. Inst. of Int'l Aff., Occasional Paper No. 73, 2011), *available at* http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_73_duanyong_20110125.pdf.

11 *China-Africa Economic and Trade Cooperation*, INFO. OFFICE OF THE STATE COUNCIL, CHINA (Sept. 2013), http://allafrica.com/stories/201309250592.html.

12 *Id.*

13 MINISTRY OF COMMERCE, CHINA, 2010 STATISTICAL BULLETIN OF CHINA'S OUTWARD FOREIGN DIRECT INVESTMENT 82–85 (2010), *available at* http://images.mofcom.gov.cn/hzs/accessory/201109/1316069658609.pdf.

14 Claude Sumata & Théophile Dzaka-Kikouta, *The Determinant of China's Foreign Direct Investment in Central Africa, African East-Asian Affairs*, THE CHINA MONITOR, June 2013, at 20, 21.

15 MINISTRY OF COMMERCE, CHINA, *supra* note 13; *Asian Foreign Direct Investment in Africa*, *supra* note 3, at 8.

16 *World Investment Report 2013*, *supra* note 2, at 40.

17 SANNE VAN DER LUGT ET AL., ASSESSING CHINA'S ROLE IN FOREIGN DIRECT INVESTMENT IN SOUTHERN AFRICA 9 (2011), *available at* http://www.ccs.org.za/wp-content/uploads/2011/03/Final-report-CCS-March-2011-CCS.pdf.

geographical fragmentation and the poorly developed infrastructure.[18] In the worst case, investors even have to be prepared to deal with such things as severe environmental degradation, social disruptions, violence, and civil wars.[19] However, contrary to Africa's relatively weak economic performance, it is endowed with one of the world's highest concentrations of natural resources, including oil, diamonds, chromium, cobalt, ores, and so forth,[20] making it an attractive business partner for China. This becomes especially apparent in the oil market. As China's demand for oil, for example, is constantly rising at an enormous growth rate,[21] it actively seeks to reduce its vulnerability to the international oil market by encouraging investments in the African oil sector; a sector often overlooked by western competitors.[22] Thus, the search for natural resources is deemed as the main motivation for OFDI.[23] Closely linked to that is the fact that many African countries have implemented a set of measures as part of the Economic Recovery Programmes ("ERP") from the 1980s onwards, including among others, trade liberalisation, exchange rate liberalisation (devaluation), fiscal and monetary reforms, public enterprise reforms and de-regulation of investments, labour, and prices.[24] In this context, Chinese manufacturers and entrepreneurs are becoming increasingly aware of the potential that the untapped African consumer market offers.[25] The African population, currently making up roughly one billion people, is estimated to significantly grow over the coming decades.[26] This positive demographic outlook offers vast opportunities for Chinese businesses, not only because their products are usually affordable, even for those living on less than the global poverty benchmark of $1 USD.[27] In addition, Africa's trade pacts with the U.S. and the E.U., the African Growth and Opportunity Act ("AGOA"), and the Economic Partnership

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[18] HARRY G. BROADMAN, AFRICA'S SILK ROAD 6 (2007); Broadman, *supra* note 4, at 92.

[19] Alexis Habiyaremeye, *Chinafrique, Africom, and African Natural Resources: A Modern Scramble for Africa*, 12 WHITEHEAD J. DIPL. & INT'L REL. 79 (2012).

[20] *Id.*

[21] China is now the world's second biggest consumer of petroleum products after the United States. *See* Ian Taylor, *China's Oil Diplomacy in Africa*, 82 J. INT'L AFF. 938, 943 (2006).

[22] Wenran Jiang, *Fuelling the Dragon: Natural Resources and China's Development*, THE CHINA Q., Sept. 2009, at 602–03.

[23] Broadman, *supra* note 4, at 88; Jiang, *supra* note 22, at 602; Sumata & Dzaka-Kikouta, *supra* note 14, at 18; Taylor, *supra* note 21, at 938.

[24] Peter Kragelund, *Knocking on a Wide Open Door: Chinese Investment in Africa*, 122 REV. AFR. POL. ECON. 479, 489 (2009).

[25] IAN TAYLOR, INTERNATIONAL RELATION OF SUB-SAHARAN AFRICA 71 (2010).

[26] *World Investment Report 2013*, *supra* note 2, at 42.

[27] Sanusha Naidu & Daisy Mbazima, *China-Africa Relations: A New Impulse in a Changing Continental Landscape*, 40 FUTURES 748, 755 (2008).

Agreement ("EPA") fostered interest in Africa as an investment place, as they offer Chinese firms the possibility to export goods at concessional rates to the U.S. and the E.U. markets.[28] Lately, African countries have been able to attract FDI flows in such diverse sectors such as the financial, telecom, electricity, retail trade, light manufacturing (apparel, footwear), and the transportation equipment sector.[29]

I. Legal Framework of Chinese FDI in Africa

A. *Definition of Foreign Direct Investment*

This article relies on the standardised definition of FDI as agreed upon by the members of the Organization for Economic Cooperation and Development ("OECD") Development Assistance Committee, the OECD Benchmark Definition:

> Foreign direct investment (FDI) is a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (*direct investor*) with an enterprise (*direct investment enterprise*) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship.[30]

The definition is not only of importance for members of the OECD itself, but is recognized by other major international institutions dealing with trade and investment.[31] Usually the following components of FDI can be identified: equity capital, reinvested earnings, and other capital (mainly intra-company loans).[32] Equity capital means "equity in branches, all shares in subsidiaries and associates,

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[28] *Id*.
[29] *World Investment Report 2013*, *supra* note 2, at xvi.
[30] Org. for Econ. Cooperation & Dev., *OECD Benchmark Definition of Foreign Direct Investment* 234 (2008) (alterations in original), *available at* http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf.
[31] *See, e.g.*, Int'l Monetary Fund, Balance of Payments Manual: Fifth Edition 86 (1993), *available at* http://www.imf.org/external/pubs/ft/bopman/bopman.pdf; *Foreign Direct Investment (FDI)*, United Nations Conf. on Trade & Dev., http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-(FDI).aspx (last visited July 20, 2014).
[32] Int'l Monetary Fund, *supra* note 31, at 87; Org. for Econ. Co-operation & Dev., *supra* note 30, at 36; *Foreign Direct Investment*, *supra* note 31; Press Re-

and other capital contributions."[33] Notably, this also includes the "greenfield investments" and M&A transactions. Reinvested earnings on the other hand usually comprise "the direct investor's share of earnings not distributed as dividends by subsidiaries or associates and earnings of branches not remitted to the direct investor."[34] And finally, other direct investment capital includes "the borrowing and lending of funds—including debt securities and suppliers' credits—between direct investors and subsidiaries, branches and associates."[35] In this context, subsidiaries are enterprises in which the investor has control of more than 50% of the voting power, while associates constitute enterprises in which the investor has control of at least 10%, but less than 50% of the voting power.[36] These basic forms of relationships can be extended through indirect ownerships (a series of subsidiaries or associated enterprises) or through joint ventures ("a contractual agreement between two or more parties for the purpose of executing a business undertaking, in which the parties agree to share in the profits and losses of the enterprise as well as the capital formation and contribution of operating inputs or costs"[37]).[38]

FDI has to be distinguished from portfolio investments. Portfolio investments refer to investments which do not necessarily represent a long-term interest.[39] Direct investment relationships, by their very nature, demand for long-term, steady financing, so that FDI in contrast to portfolio investments always triggers management or control of the company. Also, FDI as a private investment is usually opposed to public funding or foreign aid. While FDI seeks to generate monetary returns, foreign aid is provided by official agencies (mainly nations) and is administered with the promotion of the economic development and welfare of the developing countries as its main objective.[40] Nevertheless, in practice a distinction is often difficult. For example, in China's case, much of the FDI is generated through alternative ways of financing as well as by the state-owned enterprises ("SOEs").[41]

lease, World Trade Organization, *Trade and Foreign Direct Investment*, http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (last visited July 20, 2014).

[33] INT'L MONETARY FUND, *supra* note 31, at 87.

[34] *Id*. at 87, 88.

[35] *Id*. at 88.

[36] ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 30, at 55.

[37] *Id*. at 237.

[38] *Id*. at 55.

[39] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN DIRECT INVESTMENT 7–8 (2004).

[40] See Official Development Assistance, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/dac/stats/officialdevelopmentassistancedefinitionandcoverage.htm (last visited Feb. 26, 2014).

[41] VAN DER LUGT ET AL., *supra* note 17, at 18.

In the Chinese context ODA therefore is often linked with private investments and trade (see below).[42]

Reasons for foreign direct investment are manifold: While some companies use FDI to produce the same or similar goods abroad to access new markets (horizontal FDI), other companies try to take advantage of the host countries' business environment (vertical FDI).[43] This can be due to gains resulting from outsourcing labour intensive production to low wage countries or in order to have access to certain raw materials, information, or technology.[44] Other reasons for companies to invest abroad include the need to minimize or diversify risks, integrating operations of a multi-stage production process, the aim of protecting or making use of non-transferable knowledge, as well as protecting and capitalizing on reputation, avoiding tariffs and quotas, and finally exchange rate consideration.[45] Thus, attracting FDI is at the top of the agenda for most developing countries. In addition to capital, it will create new jobs, bring new technology, marketing techniques, and management skills.[46]

B. *China's Current Investment Policy Towards Africa*

The rapid growth of the Chinese OFDI started with the adoption of the "Going Global" strategy ("Zou-chu-qu") that was first announced in 1998 and embedded in the Tenth Five-Year Plan on National Economy and Social Development in 2001, and included in every plan thereafter.[47] The "Going Global" strategy (sometimes also referred to as the "Go Out" policy) is basically a long-term, innovation-oriented development plan, in the context of which the government promulgated a series of regulations and circulars in order to facilitate and encourage OFDI.[48] Recognizing outward investment as necessary for the growth of Chinese economy, Chinese policymakers encouraged and supported key firms by offering a number of incentives and benefits including tax rebates, investment insurances, direct and indirect subsidies, and most importantly, low interest loans or export credits from financial sources that the Chinese government controls such as state banks.[49] Especially through its Export-Import Bank ("EXIM

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42 Barry van Wky, *Resources for Infrastructure: China's Role in Africa's New Business Landscape*, THE CHINA ANALYST, Sept. 2011, at 1.
43 IMAD A. MOOSA, FOREIGN DIRECT INVESTMENT – THEORY, EVIDENCE AND PRACTICE 4 (2000).
44 *Id.*
45 *Id.* at 268–69.
46 Broadman, *supra* note 18, at 152.
47 Berger, *supra* note 7, at 6.
48 Ping Deng, *Investing for Strategic Resources and its Rationale: The Case of Outward FDI from Chinese Companies*, 50 BUS. HORIZON 72 (2007).
49 *Id*. at 72, 73; Kragelund, *supra* note 24, at 485.

Bank"), China is increasingly making use of a deal structure that is known as the "Angola mode," "resources for infrastructure" or "package deals"[50] combining foreign aid and economic development.[51] Typically, a beneficiary country receives a loan for the development of infrastructure, including electricity generation, telecom expansion, railway construction, and water catchments, while the repayment of the loan is done in terms of natural resources.[52] Both the contracts for the infrastructure project, as well as the rights for extracting natural resources are generally awarded to Chinese companies.[53]

In the Outward Investment Sector Direction Policy & 2006 Catalogue of Industries for Guiding Outward Investment issued among others by the National Development and Reform Commission ("NDRC"), the Ministry of Commerce ("MOFCOM"), and the Ministry of Foreign Affairs ("MFA"), special emphasis has been given to the following projects:

(1) Projects that can acquire resources or raw materials for which there is a domestic shortage and an urgent need for the national economic development;
(2) Projects that can promote the export of domestic products, equipment, and technologies with competitive advantages, as well as the export of labour service;
(3) Projects that can significantly improve China's capacity in technology, research, and development, and can utilize global cutting-edge technologies, advanced management expertise, and professionals.[54]

Next to these three priority areas, other official policy documents name a fourth area relating to mergers and acquisitions that enhance the international competitiveness of Chinese enterprises and accelerate their entry into foreign markets.[55]

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[50] *See generally* Vivien Foster et. al, *Building Bridges: China's Growing Roles as Infrastructure Financier for Sub-Saharan Africa*, (World Bank Public-Private Infrastructure Advisory Facility, Trend and Policy Options No. 5, 2009); Hannah Edinger & Jansson Johanna, *China's 'Angola Model' comes to the DRC*, CHINA MONITOR, no. 34, Oct. 2008, at 4, *available at* http://www.ccs.org.za/downloads/monitors/China%20Monitor%20October%202008%20(4).pdf.
[51] Wky, *supra* note 42, at 1.
[52] *Id.*
[53] *Id*.
[54] Nat'l Dev. & Reform Comm'n, China, *Outward Investment Sector Direction Policy & 2006 Catalogue of Industries or Guiding Outward Investment in Chinese Outward Investment*, *in* CHINESE OUTWARD INVESTMENT: AN EMERGENCY POLICY FRAMEWORK 67, 67 (Nathalie Bernasconi-Osterwalder et al eds., 2012).
[55] *See, e.g.*, Nat'l Dev. & Reform Comm'n, China, *Circular About the Relative Issues on Offering More Financing Support to Key Overseas-invested Projects*, *in* CHI-

In order to invest abroad, Chinese companies must first go through an administrative procedure of examination and approval from the MOFCOM, the NDRC, China Customs, and the State Administration of Foreign Exchange ("SAFE") at various levels.[56] This procedure is mainly regulated in the 2009 Measures for Overseas Investment Management, which the MOFCOM issued (annulling the 2004 Provisions on the Examination and Approval of Investment to Run Enterprises Abroad). Depending on the category of the projects (resource exploitation project or non-resource exploitation) and on the size of the project, the approval can be either granted by the central or the provincial government.[57]

Through the Forum on China-Africa Cooperation ("FOCAC"), China is furthermore stressing the element of cooperation with the African continent regarding their mutual investment relations. The first forum was held in October 2000 in Beijing and has ever since taken place in a three-year interval, with the latest ministerial conference taking place in July 2012 in Beijing, China. The results of the FOCAC meetings are outlined in the Action Plans which set out the general principles of Sino-African development, trade, and investment. In their latest Action Plan, the partners committed themselves to continue to encourage mutual investment and to push forward negotiations and implementations of bilateral agreements on promoting and protecting investments.[58]

C. BRICS's Current Investment Policy towards Africa[59]

The African relationship with BRICS is far more complex, internally divergent, and perhaps precarious than it may seem. The im-

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NESE OUTWARD INVESTMENT: AN EMERGING POLICY PROJECTS 52, 53 (Nathalie Bernasconi-Osterwalder et al eds., 2012).

[56] OXFAM H.K., UNDERSTANDING CHINA'S OVERSEAS FOREIGN DIRECT INVESTMENT 7 (2012), *available at* http://www.oxfam.org.cn/uploads/soft/20130428/1367136257.pdf; Wang & Wang, *Chinese Manufacturing Firm's Overseas Direct Investment*, *in* RISING CHINA: GLOBAL CHALLENGES AND OPPORTUNITIES 99, 102 (Jane Golley & Lig-ang Song eds., 2011).

[57] United Nations Conference on Trade & Dev., *Asian Foreign Direct Investment in Africa*, *supra* note 3, at 54.

[58] *The Fifth Ministerial Conference of the Forum on China-Africa Cooperation Beijing Action Plan (2012–2015)*, FORUM ON CHINA-AF. COOPERATION, http://www.focac.org/eng/zxxx/t954620.htm.

[59] This section (with further references) is largely based on Oliver C. Ruppel & Katharina Ruppel-Schlichting, *The BRICS Partnership: Development and Climate Change Policy from an African Perspective*, *in* CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE: POLICY, DIPLOMACY AND GOVERNANCE IN A CHANGING ENVIRONMENT 549–69 (Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting eds., 2013).

pact of the BRICS countries on Africa can only be correctly understood if it is seen as part of a wider shift in the international balance of power, both politically and economically. BRICS is emerging as an intergovernmental network somewhat comparable to, for instance, the, Group of 20 ("G20"). It functions on agenda-setting, consensus-building, policy coordination, and as a platform for knowledge production and information exchange. So far, BRICS consists of five states with no founding document (formal charter or treaty). This means that there is actually no formal structure, voting procedure, or central secretariat. Moreover, BRICS so far fails to provide for any mechanism to come up with legally binding decisions, nor does it have a dispute settlement procedure in place. However, the BRICS leaders have issued several joint statements and declarations. Of particular importance are the official documents that have resulted from the BRIC and BRICS summits, namely:

- 2009 Joint Statement, Yekaterinburg, Russia
- 2010 Joint Statement, Brasília, Brazil
- 2011 Sanya Declaration, Sanya, China
- 2012 Delhi Declaration, New Delhi, India,
- 2013 eThekwini Declaration, Durban, South Africa, and
- 2014 Fortaleza Declaration, Brazil

Several other official documents have been produced by the Summits and on the BRICS ministerial level, such as the 2011 BRICS Agriculture Ministers Declaration or the 2011 BRICS Finance Ministers Communiqué. Yet, BRICS does not constitute an international organisation in the strict sense of public international law and it is yet to be seen whether it will develop as such in the future. BRICS is neither an international organisation nor a trade bloc in terms of a regional (or preferential) economic community. It refers to itself as a "partnership," which comprises a non-hierarchical governance structure in which relations among actors are repeated and enduring, but where no one has the power to arbitrate and resolve disputes among the members. With regards to investment policy, the Contact Group on Economic and Trade Issues ("CGETI") is intended to become a platform for BRICS. It shall aim to foster trade cooperation and encourage investment links between BRICS countries with an emphasis on sharing policy practices on trade and investment.

The Fifth BRICS Summit on 27 March 2013 in Durban, which was hosted by South Africa's President Jacob Zuma, took place under the working title "BRICS and Africa: Partnership for Development, Integration and Industrialisation."[60] In their final summit declaration,

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[60] Fifth BRICS Summit, *eThekwini Declaration*, (Mar.27, 2013), http://www.brics5.co.za/about-brics/summit-declaration/fifth-summit/.

the leaders of the BRICS provided for a retreat together with African leaders after the summit, under the theme, "Unlocking Africa's potential: BRICS and Africa Cooperation on Infrastructure."[61] The retreat was an opportunity for BRICS and African leaders to discuss how to strengthen cooperation between the BRICS countries and the African Continent.[62] Furthermore, BRICS leaders confirmed their support for African countries in their industrialisation process through stimulating foreign direct investment, knowledge exchange, capacity building, and diversification of imports from Africa within the framework of the New Partnership for Africa's Development ("NEPAD").[63] It was acknowledged that infrastructure development was of special importance for the African continent, so that BRICS will now actively "seek to stimulate infrastructure investment on the basis of mutual benefit to support industrial development, job-creation, skills development, food and nutrition security and poverty eradication and sustainable development in Africa."[64] Although China is just one of five members of the BRICS community, this cooperation also helps to intensify trade and investment links between China and Africa.

D. Other Relevant Legislation

In the first place, each national state has the power to regulate FDI and to provide domestic incentive schemes in order to attract FDI. These measures include among others tax incentives, economic processing zones, investment promotion agencies, and investment climate assessments next to a general good-policy framework.[65] However, international investment flows are also regulated by arrangements that are multilateral or regional in nature.

1. Multilateral Investment Agreements

A multilateral investment agreement ("MIA") regulating all substantive aspects of FDI (comparable to the Global Agreement on Tariffs and Trade ("GATT") regarding trade) was discussed intensively during the previous decades, but was in fact never concluded due to strong opposition by many developing states (namely India and Brazil) and the anti-globalisation movement.[66] So far, only the procedural aspects of international investment law are codified in a multilateral

[61] *Id.*
[62] *Id.*
[63] *Id*. at 5.
[64] *Id.*
[65] BROADMAN, *supra* note 18, at 153.
[66] Anders Aslund, *The World Needs a Multilateral Investment Agreement* 5 (Peterson Inst. for Int'l Econ., Paper No. PB13-01, 2013), *available at* http://www.piie.com/publications/pb/pb13-1.pdf.

agreement—the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), which regulates a voluntary dispute resolution system for states and investors.[67] Under the ICSID Convention, the International Centre for Settlement of Investment Disputes was established to "provide facilities for conciliation and arbitration of investment disputes between Contracting States."[68] Currently the ICSID Convention has been signed and ratified by 158 states.[69] Furthermore, the WTO deals with many aspects relating to FDI. According to paragraph twenty-six of the Sanya Declaration, BRICS is generally committed to supporting a strong, open, rules-based multilateral trading system embodied in the WTO. While the Agreement on Trade-Related Investment Measures ("TRIMs") is by far the most comprehensive agreement, certain aspects of FDI are also regulated in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") and the General Agreement on Trade in Services ("GATS"), as well as the WTO Agreement on Subsidies and the multilateral Government Procurement Agreement.

2. Investment Law on the African Continent

Turning to the African continent, the African Union ("A.U."), which was established on the 26th of May 2001 in Addis Ababa as an African continental union, and which consists of fifty-four African states,[70] does not have a specific strategy document focusing on investments.[71] But, within the framework of the A.U., the New Partnership for Africa's Development ("NEPAD") was created, which is an economic development program that aims to provide an overarching vision and policy framework for accelerating economic co-operation and integration among African countries.[72] In its Framework Document, NEPAD specifically recognises the importance of increasing investments to Africa as an essential component for a sustainable long-term approach to fulfil the International Development Goals, particularly the goal of reducing the proportion of Africans living in poverty by one

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[67] Monika C. E. Heymann, *International Law and the Settlement of Investment Disputes Relating to China*, 1 J. INT'L ECON. L., 507, 509 (2008).

[68] International Centre for Settlement of Investment Disputes art. 1, April 2006.

[69] *Id.*

[70] *Organization of African Unity (OAU)/ African Union (AU)*, DEP. OF INT'L REL. & COOPERATION S. AFR., http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm (last visited July 19, 2014).

[71] Department of Trade and Industry, *Bilateral Investment Treaty Policy Framework Review, available at* http://db3sqepoi5n3s.cloudfront.net/files/docs/090626 trade-bi-lateralpolicy.pdf (last visited Feb. 26, 2014).

[72] *About*, NEW PARTNERSHIP FOR AFR.'S DEV., http://www.nepad.org/about (last visited July 19, 2014).

half.[73] The NEPAD document prioritises specific areas and envisages certain actions that are deemed to be important to attract investments. Thus, the NEPAD process has mainly an enabling function contributing to the creation of a positive investment climate on the African continent as a whole. Finally, most African regional communities[74] developed regional investment promotion measures. These measures (regional investment policies or treaties, regional investment promotion agencies, and investment forums) [75] aim to promote market-friendly policies and regional integration, which can ultimately lead to improvements in the productivity of investments.[76] For example, renewable energy certificates ("RECs") can coordinate national infrastructure plans within a regional framework or can create continental energy markets, which contributes to a positive investment climate.[77]

3. Bilateral Investment Treaties

Nevertheless, the main instruments governing FDI flows remain bilateral investment treaties (BITs) and double taxation treaties ("DTT"). Over the last few decades the world has seen an increasing

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[73] New P'ship for Afr.'s Dev., NEPAD Framework Document 37 (2001), *available at* http://www.nepad.org /nepad/knowledge/doc/1767/nepad-framework-document.

[74] In the Abuja Treaty (which established the African Economic Community) regional economic communities are seen as the "building blocks" or the basis for the African integration. Currently there are eight of theses RECs recognised by the AU: The Arab Maghreb Union (UMA), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and finally the Southern African Development Community (SADC). *Cf*. Oliver C. Ruppel*, Regional Economic Communities and Human Rights in East and Southern Africa*, *in* HUMAN RIGHTS IN AFRICA 275-318 (Anton Boesl & Joseph Diescho eds., 2007).

[75] *See* Meeting of the Committee of Experts of the Sixth Joint Annual Meetings of the ECA Conference of African Ministers of Finance, Planning and Economic Development and AU Conference of Ministers of Economy and Finance, Abidjan, Côte d'Ivoire, Mar. 21–24, 2013, *Assessment of Progress on Regional Integration in Africa*, E/ECA/COE/32/3, U.N. Doc. E/ECA/COE/32/3 (Mar. 8, 2013), *available at* http://www.uneca.org/sites/default/files/document_files/assessment-of-progress-on-regional-integration_en_0.pdf; Protocol of Finance and Investment, Annex 1, Aug. 18, 2006, *available at* http://www.sadc.int/documents-publications/show/1009 (entered into force Apr. 14, 2010)

[76] *China and Regional Integration as Drivers of Structural Transformation in Africa*, S. AFR. FOREIGN POL'Y INACTIVATE, http://www.safpi.org/news/article/2013/china-and-regional-integration-drivers-structural-transformation-africa (last visited July 22, 2014).

[77] *Id*.

proliferation of BITs and DDTs, indicating a growing competition for FDI.[78] While DTTs provide foreign investors with tax-issue security, stability, and hinder double taxation of corporate incomes, BITs encourage and facilitate investment flows through liberalisation and protection of foreign investment.[79] They are defined as agreements that

> protect investments by investors of one state in the territory of another state by articulating substantive rules governing the host state's treatment of the investment and by establishing dispute resolution mechanism applicable to alleged violations of those rules.[80]

Presently, BITs show a "considerable uniformity,"[81] with some constituting principles regarding the substantive and procedural protection of foreign investment. Salacuse identifies in total nine topics that are covered by almost all international investment treaties:

> (1) [D]efinitions and scope of application; (2) investment promotion and conditions for the entry of foreign investments and investors; (3) general standards for the treatment of foreign investors and investments; (4) monetary transfers; (5) expropriation and dispossession; (6) operational and other conditions; (7) losses from armed conflict or internal disorder; (8) treaty exceptions, modifications, and terminations; and (9) dispute settlement.[82]

With regards to standards of treatment, one can distinguish between absolute and relative standards of treatment. While the latter defines the required treatment to be granted to investment by reference to the treatment accorded to other investments, absolute standards are non-contingent.[83] Relative standards of treatment include the "national treatment" and the "most-favoured-nation" principle.[84] In their typical versions, the national treatment clause demands that foreign investors should not be treated worse than domestic investors,[85] while the most-favoured nation principle means that privileges provided to one foreign investor must be provided to all.[86] Absolute

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78 Kragelund, *supra* note 24, at 8.
79 *Id*.
80 Kenneth J. Vandevelde, *The Economic of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469 (2000).
81 Berger, *supra* note 7, at 4.
82 Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J., 427, 432 (2010).
83 OECD, *International Investment Law: A Changing Landscape* 74, (2005).
84 *Id*.
85 Rudolf Dolzer, Symp. *Making The Most of International Investment Agreements: A Common Agenda National Treatment: New Developments* (Dec. 12, 2005).
86 Broadman, *supra* note 23, at 8.

standards of treatment that are utilised in BITs usually include the international minimum standard of treatment, the "fair and equitable standard of treatment" ("FET standard") and "full protection and security."[87]

4. Sino-African BITs

In general it can be observed that the number of Chinese BITs has been constantly rising as the Chinese economy has become more powerful.[88] China only started concluding BITs in 1982 (when the first BIT was signed with Sweden) and mainly focused on developed, capital-exporting countries as contracting partners in the first few years.[89] The main goal of its investment policy in the early years was to promote IFDI, rather than protect OFDI.[90] However, as of June 2013, China had concluded 131 BITs and is thus ranked second after Germany in terms of the total number of BITs concluded worldwide.[91] On the African continent China has concluded over 30 BITs as of 2013.[92]

When analysing the Chinese BITs concluded with the African countries, one of the remarkable features of the Sino-African BITs is the fact that they do not follow the normal BIT pattern—that they are concluded between a capital-exporting developed state and a developing state keen to attract capital, but between two developing countries. This category of BIT is generally known as the South-South BIT.[93] However, the Sino-African BITs contain all standard provisions found in global BIT practice, like a preamble stating the intentions of the contracting parties, definitions of investment and investors, as well as

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[87] SORNARAJAH, *supra* note 39, at 233.

[88] UNITED NATIONS CONFERENCE ON TRADE & DEV., GLOBAL INVESTMENT TRENDS MONITOR, *supra* note 3, at 54–56.

[89] Wenhua Shan & Nora Gallagher, *China* 132, in COMMENTARY ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., 2013).

[90] *Id*.

[91] United Nations Conference on Trade & Dev, *Full List of Bilateral Investment Agreements Concluded, 1 June 2013*, http://unctad.org/Sections/dite_pcbb/docs/bits_china.pdf.

[92] With Algeria, Benin, Botswana, Cape Verde, Chad, Congo, Cote d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Ghana, Guinea, Kenya, Madagascar, Mali, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Sierra Leone, South Africa, Sudan, Seychelles, Tunisia, Uganda, Zambia and Zimbabwe. *See id*.

[93] *See, e.g.*, MALIK MAHNAZ, IV ANNUAL FORUM FOR DEVELOPING COUNTRY INV. NEGOTIATORS BACKGROUND PAPERS NEW DELHI, OCT. 27–29, 2010, SOUTH-SOUTH BILATERAL INVESTMENT TREATIES: THE SAME OLD STORY? (2010), *available at* http://www.iisd.org/pdf/2011/dci_2010_south_bits.pdf; United Nations Conference on Trade & Dev., *South-South Investment Agreements Proliferating*, INT'L INVESTMENT AGREEMENTS MONITOR, no. 5, 2005, *available at* http://bit.escwa.org.lb/CMSPages/GetFile.aspx?nodeguid=2e36f350-c502-43a2-8afb-cf2b5215fe46.

certain subjective and procedural investment protection provisions. The main reason for this is certainly that the dynamic of the comparatively more developed southern countries versus the lesser-developed southern treaty partner mirrors that of the north-south dynamic.[94]

In general, all Sino-African BITs adopted the admission model. This means that the treaty provides investment protection only after the admission of the FDI project.[95] The admission model is opposed to the pre-establishment model (the screening power of the state is already restricted in the pre-establishment phase) that has been applied by the U.S., Canada, and Japan in their BIT practices.[96] When considering Chinese investment policies, one always has to bear in mind that China started as a capital-importing state and was therefore rather inclined to protect its sovereign right to regulate foreign investment.[97] Ever since the volume of its OFDI increased rapidly, China began to adopt a more liberal approach by trying to increase the legal protection of its own investment.[98] This also has an influence on Sino-African investment practice.

One of the most important goals of a BIT is obviously to promote investments. Thus, every BIT usually contains a provision that specifically reiterates this goal. However, most Sino-African BITs tend to leave the control and protection of the admission to the discretion of the host country ("*in accordance with its laws and regulations*"),[99] showing that there is still some reluctance to liberalize existing investment regimes. In the following subparagraphs, the treaties usually go into more detail and call for assistance and the provision of facilities for obtaining visa and work permits, as well as other necessary permits,[100] licence agreements, and contracts for technical, commercial, or administrative assistance. These provisions are of special importance within the Sino-African context because one of the greatest impediments to trade and investment on the African continent are the non-tariff barriers ("NTB"), like delays of customs clearance procedures, complex documentation requirements, and unpredictable procedures at the border.[101] Especially measures that relate to entry and establishment, like bans on foreign investment in certain sectors,

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[94] Mahnaz, *supra* note 93, at 3.
[95] Berger, *supra* note 7, at 4.
[96] *Id.*
[97] Congyan Cai, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, 7 J. World Inv. & Trade 621, 626 (2006).
[98] Berger, *supra* note 7, at 1.
[99] *See, e.g.*, China- South Africa BIT (1997) art. 2 (1).
[100] *See, e.g.*, China- South Africa BIT (1997) art. 2 (2).
[101] Karin Hasse, *Non-Tariff Barrier Choke African Trade,* 8 J. Good Goverance Afr. 5 (2013), *available at* http://gga.org/publications/africa-in-fact-february-2013-trade.

screening, and approval requirements; measures that deal with ownership and control, like compulsory joint ventures, transfer of technology, or managerial know-how; and finally, operational measures, like performance requirements, operational permits or licences, or local content restrictions can become impediments to international investments.[102] At least to some extent the Sino-African BITs can serve as a remedy to non-tariff barriers as they provide for assistance for obtaining necessary permits, licence agreements, and contracts for technical, commercial, or administrative assistance.[103] Also, the general commitment to encourage FDI flows can be seen as an incentive to abolish certain NTBs.

With regards to absolute standards of treatment, all Sino-African BITs include a provision reiterating the principle of fair and equitable treatment.[104] But notably these provisions do not contain any reference to the international minimum standard of treatment[105] or full protection and security.[106] With regards to the relative standards of treatment, China rarely included the standard of national treatment in its BIT practice before 1998. Berger argues that the main reason for this was the aim to protect "infant industries and especially state-owned enterprises from foreign companies' competition."[107] Most Chinese BITs offered the standard of most-favoured-nation treatment only.[108] But with the changing circumstances, China now being a capi-

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[102] MICHAEL V. GESTRIN, A Stocktaking of Investment-Related Barriers in Africa 3 (OECD-Africa Round-table), *available at* http://www.oecd.org/daf/inv/investmentfordevelopment/21040978.pdf.

[103] Bilateral Investment Agreement, China-S. Afr., art. 2, ¶3, Dec. 30, 1997.

[104] See e.g., Bilateral Investment Treaty, Benin-China, art. 3, ¶1, Feb. 18, 2004, *available at* http://www.aseanbriefing.com/userfiles/resources-pdfs/China/BIT/Asia_BIT_Benin_China.pdf.; Agreement on Promotion and Protection of Investment, China-Bots., art. 3, June 12, 2000, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/500; Agreement on the Promotion Protection of Investments, China-Cote d'Ivoire, art. 3 (1), Sep. 30, 2002, *available at* http://www.asianlii.org/cn/legis/cen/laws/abtgotprocatgotrocdotpapoi1477/; Agreement on the Reciprocal Promotion Protection of Investments, China-Uganda, art. 3, May 27, 2004, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/790.

[105] An exception is a China-Seychelles Bilateral Investment Treaty signed in 2007. *See* Berger, *supra* note 8, at 10 (explaining that China traditionally rejected customary international law as a Western concept).

[106] Again exceptions apply. *See e.g.*, Bilateral Investment Treaty Agreement, China-Madag., art. 5 (1), Nov. 21, 2005, *available at* http://www.aseanbriefing.com/userfiles/resources-pdfs/China/BIT/Asia_BIT_Madagascar_China.pdf.

[107] Berger, *supra* note 7, at 8.

[108] *See e.g.*, Agreement Concerning the Enforcement and Reciprocal Protection of Investment, China-Ghana, art. 3, Oct. 12, 1989, *available at* http://tfs.mofcom.gov.cn/aarticle/h/aw/201002/20100206778950.html; China-South Africa BIT, art.

tal-exporting country, it also gradually gave up its reservations. In most Sino-African BITs a provision granting nation treatment is now included but accompanied by the phrase "without prejudices to its laws and regulation," thereby restricting it to a best effort clause.[109] National treatment is thus not granted unless the host countries' laws and regulations grant foreign investors treatment not less favourable than that accorded to domestic investors. Other Sino-African BITs include a paragraph allowing for national treatment,[110] but in a separate protocol China reserves the right to maintain laws and regulations towards foreign investors that are incompatible with national treatment.[111] Only the BIT with the Seychelles in fact grants full national treatment without any further restrictions.[112]

In line with its changing attitude towards national treatment, China only recently started to grant unrestricted access to international arbitration.[113] When China became a Contracting State of the ICSID Convention in 1993,[114] it continued to conclude BITs without making explicit reference to ICSID arbitration.[115] Nowadays such a provision can be found in most Sino-African BITs. There is no requirement to exhaust local remedies first and the submission of the dispute to the arbitral tribunal is not dependent on the consent of both parties. The only restriction that still exists is the refusal to grant the right to transnational arbitration once the investor has chosen to access the host country's domestic judiciary and the requirement to conduct an administrative review procedure. This raised the question "whether the newly concluded Chinese BITs containing an ICSID clause may have effects on earlier BITs without such a clause through the application of the most-favoured-nation clause."[116] Case law on the question of the application of the most-favoured-nation clause to procedural rights is contradictory: While in the *Maffezini* case a tribunal applied

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3 (3), which remarkably only provides for national treatment by the Republic of South Africa. So while Chinese authorities are still allowed to discriminate South African investors, Chinese investors can rely on national treatment provisions.

[109] Berger, *supra* note 8, at 12.

[110] China-Uganda BIT, *supra* note 106, art. 3, ¶ 2; China-Cote d'Ivoire, *supra* note 105, art. 3, ¶ 2.

[111] Berger, *supra* note 8, at 9.

[112] Bilateral Investment Agreement, China-Seychelles, art.3, ¶ 2, Oct. 2, 2007, *available at* http://investmentpolicyhub.unctad.org/IIA/country/188/treaty/966.

[113] Berger, *supra* note 8, at 10.

[114] INT'L CENTER FOR SETTLEMENT OF INVESTMENT DISP. [ICSID], *List of Contracting States and Other Signatories of the Convention*, ICSID (Apr. 11, 2014), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main.

[115] China-South Africa BIT, *supra* note 103.

[116] Heymann, *supra* note 67, at 519.

the most-favoured-nation clause to dispute resolution provisions (in fact to a procedural waiting period),[117] more recent case law explicitly rejected this line of thought with regards to invoking ICSID jurisdiction.[118] Only recently in 2007 did a Chinese company log the first arbitration request,[119] and it was not before 2011 that the first claim was filed against China under the ICSID Convention.[120]

Finally, China is well aware of the unstable region it deals with and is especially aware of the fact that its outward FDI can face considerable political risks. Sub-Saharan Africa is one of the regions that has experienced a rising trend of conflicts during the past couple of decades.[121] While some of these civil wars are a result of the ethnic and religious diversity, some of the main factors contributing to the instability of the continent are "the high levels of poverty, failed political institutions and economic dependence on natural resources." [122] Investors coming to the African continent, of course, have to be prepared for this and this is especially true for China who has been heavily engaged in many African conflict areas as well as post-war countries like Sierra Leone, Angola, or the Sudan.[123] To safeguard its FDI, some BITs with African countries therefore include a provision providing for national treatment (and not only the regular most-favoured-nation treatment) in the case of war and civil strife.[124]

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[117] Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000).

[118] Plasma Consortium Ltd. v. Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005).

[119] Victor Pey Casado & President Allende Foundation v. Republic of Chile, Pending Case, ICSID Case No. ARB/98/2, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last visited Feb. 26, 2014).

[120] *See* ICSID, https://icsid.worldbank.org/ICSID/FrontServlet (last visited Feb. 28, 2014).

[121] According to a study conducted by Elbadawi & Sambanis "over the last 40 years nearly 20 African countries (or about 40% of Sub-Saharan Africa) have experienced at least one period of civil war. *See* Ibrahim Elbadawi & Nicholas Sambanis, *Why Are There So Many Civil Wars in Africa?*, 9 J. AFR. ECON. 244 (2000).

[122] *Id*. at 244, 254.

[123] Daniel Large, *China's Involvement in Armed Conflict and Post-War Reconstruction in Africa: Sudan in Comparative Context*, in OIL DEVELOPMENT IN AFRICA: LESSONS FOR SUDAN AFTER THE COMPREHENSION PEACE AGREEMENT 62 (L. Patey ed. 2000).

[124] China-Bots. BIT (2000) art. 3 (2).

II. Evaluation of Chinese Investment Policies towards Africa

A. *General Evaluation of the Investments*

Especially large Chinese infrastructure projects like the building of dams, hospitals, government offices, stadiums, and streets throughout Africa are at the forefront of public attention.[125] But, apart from these very obvious accomplishments of Chinese engagement on the continent, the Chinese demand stimulated raw material prices increasing the income of many African countries and promoting African industries.[126] African countries gained more choices for business partners and export markets, turning away from the dominion and dependence from the West.[127] This is especially true because the ordinary customer profits from cheap Chinese goods, which are affordable for large parts of the population and thus help to develop the consumer sector across the continent.[128] African governments appreciate that Chinese engagement comes with no "strings attached," meaning that China does not want to impose certain values on its African partners as do many Western-dominated international financial institutions with their foreign aid and debt relief programmes.[129] In this regard, the China-Africa Development Fund is becoming an appealing alternative to traditional sources of funding.[130] However, there is also a downside to the Chinese presence on the African continent. In fact, it did not bring good to the continent in terms of environmental concerns, human rights, and economic development.

First of all, the strong reliance upon raw materials like oil and the resulting dependency on export revenues from the extracting sector is highly problematic (the so called "resource curse").[131] Natural resource investments are often very capital-intensive with standardized processes only creating modest spill-overs on local labour and technologies.[132] It must be feared that governments refrain from initialising necessary political and economic reforms like investment in human capital and infrastructure, institutional reforms, structural di-

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[125] Taylor, *supra* note 25, at 951.

[126] Li Anshan, *China's New Policy Toward Africa*, in China Into Africa: Trade, Aid, Influence 39 (Robert I. Rotberg ed. 2008).

[127] *Id*.

[128] Daniel Flynn, *Africa Investment, China Brings Goods and Roads, Now Africa Wants Jobs*, Reuters, (July 21, 2013) http://www.reuters.com/article/2013/07/21/africa-china-idUSL6N0FI3TE20130721 (last visited Feb. 28, 2014).

[129] Ana Christina Alves, *Making Sense of Chinese Oil Investment in Africa*, in China's Return To Africa 84 (Chris Alden ed. 2008).

[130] Habiyaremye, *supra* note 19, at 90.

[131] *Id*. at 82.

[132] Miria A. Pigato, *The Foreign Direct Investment Environment in Africa* 3, *available at* www.worldbank.org/afr/wps/wp15.pdf (last visited Feb. 26, 2014).

versification, and technology accumulation, which are crucial for an employment-intensive and inclusive growth.[133] Other negative side effects of the over-reliance on the export of raw materials are the vulnerability to the vitality of the international commodity markets,[134] the possible misallocation of revenue incomes in governmental budgets, corruption practices, environmental degradation, and sometimes even violent conflicts.[135] While this problem is not a specific feature of the Sino-African trade, Chinese companies generally keep downstream and processing activities within China, only importing pure raw materials,[136] as labour market efficiency is currently still higher in China than in Africa.[137] Ultimately, this means "the jobs and wealth from processing the natural resources are created elsewhere."[138] And even on the worksites in Africa where they could employ local workers, Chinese enterprises tend to employ Chinese workers.[139]

All of this contributes to the general perception that the Sino-African investment relations might not be sustainable in the long run.[140] The Chinese government and many enterprises are well aware of these resentments and work on changing this perception.[141] The African partners on the other hand ultimately have to initialise the necessary political and economic reforms to be able to attract investments in areas other than in the natural resource sector. Currently, African countries should look for opportunities to make the existing investment relationships more beneficial for the local economies. They could, for example, demand that investors have to meet certain criteria, that they use domestic inputs such as labour and supplies, that they transfer technology, or train local workers.[142] Also, governments should seek options to keep down-stream activities in the country after the

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[133] Deutsche Bank Research, *China's Commodity Hunger: Implications for Africa and Latin America* 12, http://www.dbresearch.com/PROD/DBR_INTERNET_DE-PROD/PROD0000000000199956.pdf (last visited Feb. 28, 2014).

[134] Taylor, *supra* note 25, at 951.

[135] Habiyaremye, *supra* note 19, at 84.

[136] Deutsche Bank Research, *supra* note 133, at 12.

[137] Frans Crul, *China and South Africa on Their Way to Sustainable Trade Relations* 10 (Tralac Working Paper 2013).

[138] Flynn, *supra* note 128.

[139] Crul, *supra* note 137, at 8.

[140] *Id.* at 2.

[141] Tongkeh Joseph Fowale, *Third World Order vs. New World Order*, POLITICALARTICLES.NET, http://www.politicalarticles.net/blog/2008/04/27/third-world-order-vs-new-world-order-sino-african-economic-cooperation-challenges-to-globalisation/ (last visited Feb. 28, 2014).

[142] DEPARTMENT OF TRADE AND INDUSTRY (South Africa), *Bilateral Investment Treaty Policy Framework Review* 48, http://db3sqepoi5n3s.cloudfront.net/files/docs/090626trade-bi-lateralpolicy.pdf (accessed Feb. 28, 2014) [hereinafter DTI].

initial investment is made. Only then will the Sino-African partnership become sustainable in the long run.

Second, especially with regards to labour rights, Chinese companies faced much criticism in recent years. Chinese employers were accused of "tense labour relations, hostile attitudes towards trade unions, various violations of workers' rights, poor working conditions and several instances of discrimination and unfair treatment."[143] Furthermore, they were heavily criticized for their policies concerning minimum wage as well as flooding the African market with low quality goods.[144] With regards to working conditions, Chinese investors are supposed to ignore certain safety and health regulation,[145] underpay workers, and break promises with regards to wage increases.[146] Primarily it is of course the responsibility of the local governments to make sure that Chinese companies comply with international and local labour laws and regulations. Most African countries enacted quite detailed and strict labour legislations,[147] ranging from regulations on general conditions of employment, which deal with ordinary hours of work as well as leave and termination of employment, and more specific legislation (e.g. South Africa's Amended Occupational Health and Safety Act (No. 85 of 1993) and South Africa's Employment Equity Act (No. 55 of 1998)).

On an international level, the International Labour Organization, as the main international body responsible for promoting social justice and internationally recognized labour rights,[148] formulated certain international labour standards.[149] Topics that are covered by the 189 ILO Conventions are for example the Freedom of Association and Protection of the Right to Organise Convention (No. 87 of 1948), the Occupational Safety and Health Convention (No. 155 of 1981), the Safety and Health in Mines Convention (No. 176 of 1995), and the

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[143] African Labour Research Network, *Chinese Investments in Africa: Opportunity or Threat for Workers* 32–38, http://www.worldlabour.org/chi/files/u1/China-Africa_Booklet_2009.pdf (last visited Feb. 02, 2014).
[144] Habiyaremye, *supra* note 19, at 88.
[145] Nick Kotch, *Zambia Seizes Chinese Mine Over Safety*, *available at* http://www.bdlive.co.za/business/mining/2013/02/21/zambia-seizes-chinese-mine-over-safety (last visited Feb. 28, 2014).
[146] Horand Knaup, *Chinas Rolle in Afrika: Ansturm der gierigen Helfer*, *available at* http://www.spiegel.de/politik/ausland/chinas-rolle-in-afrika-ansturm-der-gierigen-helfer-a-728609.html (last visited Feb. 28, 2014).
[147] South African Labour Law legislations are available at the website of the Department of Labour, *see* http://www.labour.gov.za/DOL/legislation (last visited Feb. 26, 2014); *see* Amended Basic Conditions of Employment Act (No. 75 of 1997).
[148] INT'L LAB. ORG. (ILO), *Mission and Objectives*, http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang—en/index.htm (last visited Feb. 28, 2014).
[149] *Id.*

Minimum Wage Fixing Convention (No. 131 of 1970).[150] Often, other international or regional institutions adopted the standards contained in these conventions in their own labour law provisions. Thus, it is crucial to enable the responsible government agencies to rigorously enforce (international and local) labour standards in order to ensure the improvement of working conditions. Also, it is important that African governments in this regard do not give in, but instead defend labour rights against Chinese investors not fearing the withdrawal of investment revenues from the country.[151]

Third, the fact that Chinese economic relations are based on the concept of a no-strings policy or policy of non-interference is highly problematic with regards to human rights and democracy.[152] Especially China's engagement in Zimbabwe and Darfur has been largely criticized.[153] The main accusation is that China, in order to gain access to raw materials, supports corrupt, authoritarian regimes at the expense of human rights.[154] As put in a Human Rights Report regarding the situation in the Sudan, "China provided financial and military support to the Sudanese government even as it was engaged in massive ethnic cleansing in Darfur."[155] Indirectly, China's activities interfere with rights that are codified in documents such as the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child.[156] In an African context, the African (Banjul) Charter on Human and Peoples' Rights is also important to mention. Rights that are affected are "the right to life, liberty and security of person,"[157] the

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150 INT'L LAB. ORG. (ILO) *Ratification by Convention*, http://www.ilo.org/dyn/normlex/en/f?p=1000:12001:0::NO (last visited July 19, 2014).

151 *See* Kotch, *supra* note 145 (referring to the election campaign of Zambian president Michael Sata in 2011).

152 TAYLOR, *supra* note 25, at 952.

153 AFRICAN LABOUR RESEARCH NETWORK, *supra* note 143, at 21.

154 Li Anshan, *China and Africa: Policy and Challenges*, 3 CHINA SECURITY 69, 83 (2007).

155 HUMAN RIGHTS WATCH, WORLD REPORT 25 (2006), *available at* http://www.hrw.org/sites/default/files/reports/wr2006.pdf.

156 Statement Delivered by Michael W. Inlander on Behalf of United Nations Watch to the 11th Session of UN Working Group On Minorities: Sudan's Mass Displacement, Rape, and Killing of Black African Minority in Darfur Constitutes Gross Violation of UN Declaration on the Rights of Minorities (June 1, 2005), http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=1747993.

157 *See* Universal Declaration of Human Rights art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); African Charter on Human and Peoples' Rights art. 4, *adopted* June 27, 1984, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

right to be free of "torture or cruel, inhumane or degrading punishment,"[158] and the "right to freedom of movement."[159] Of course, it is important to acknowledge that China only enables a situation in which these human right violations are possible and cannot be made responsible for them in the first place. Also, it is important to notice that China's position of non-interference, for example with regard to Zimbabwe, is in accord with that of the AU[160] and that lately, for example in Darfur, China assumed a more active role trying to mediate between the Sudanese government and other actors.[161] However, being one of the largest investors in many unstable and crisis-ridden countries, the Chinese could have done more "to exercise their growing ability to be a persuasive and responsible stakeholder."[162]

Finally, Chinese investors are engaging in many projects on the African continent like hydropower dams, concessions for tropical hardwood, large rainforest plantations, roads, as well as large-scale mining, which poses a significant risk for the environment in Africa.[163] Against this background, Chinese companies have been accused of violating environmental rights of the local communities where they operate. The Niger Delta, for example, was once Nigeria's richest area of biodiversity but now suffers from severe environmental degradation caused in part by frequent oil spills and dumping of industrial waste.[164] There are now many international agreements that acknowledge the right to a clean and healthy environment such as the Universal Declaration on Human Rights of 1948 (Art. 25), the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (Art. 29), and the African Charter on Human and Peoples' Rights (Art. 24). Noteworthy in the Chinese-African investment context are the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1992 Convention on Biodiversity, and the 1998 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. For a long time China did not have envi-

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158 *See* Universal Declaration of Human Rights, *supra* note 157, art. 5; African Charter on Human and Peoples' Rights, *supra* note 157, art. 5.

159 *See* Universal Declaration of Human Rights, *supra* note 157, art. 13; African Charter on Human and Peoples' Rights, *supra* note 157, art. 12.

160 Anshan, *supra* note 154, at 75.

161 *Id.* at 76–77; *see also* Bates Gill & James Reilly, *The Tenuous Hold of China Inc. in Africa*, 30 THE WASH. Q., no. 3, 2007, at 37.

162 DEBORAH BRAUTIGAM, THE DRAGON'S GIFT: THE REAL STORY CHINA IN AFRICA 292 (2011).

163 *Id.* at 299.

164 Habiyaremye, *supra* note 19, at 80.

ronmental laws that specifically related to OFDI.[165] The first guidelines that specifically addressed environmental issues were guidelines concerning social and environmental impact assessments issued by China's EXIM Bank in 2008.[166] In March 2013, the MOFCOM and the Ministry of Environmental Protection (MEP), as a next step, jointly issued the Guidelines on Environmental Protection in Investment and Cooperation Overseas ("Guideline on Environmental Protection").[167] But with no sanctions for violations of the guidelines and without much civil society activism, it will be difficult to actually hold Chinese investors accountable.[168]

B. Evaluation of the Sino-African BIT Practice

Lately, the effectiveness of BITs as a means to attract international investments has been called into question.[169] As statistics show, there are many investors and host states that totally refrain from the conclusion of BIT.[170] Thus, it is highly disputed whether BITs can serve as substitutes for good institutional quality and local property rights and thereby promote FDI inflows.[171] However, China and its

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[165] OXFAM H.K., *Understanding China's Overseas Foreign Direct Investment: A Mapping of Chinese Laws and Stakeholders* 26 (2012), *available at* http://www.oxfam.org.cn/uploads/soft/20130428/1367136257.pdf.

[166] BRAUTIGAM, *supra* note 162, at 303.

[167] *Guidelines on Environmental Protection in Investment and Cooperation Overseas*, MINISTRY OF COMMERCE CHINA, (Mar. 1, 2013, 7:28 PM), http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml.

[168] *See* BRAUTIGAM, *supra* note 162, at 301 (referring to China's State Forestry Administration and the Ministry of Commerce guidelines which Chinese logging companies are expected to use abroad).

[169] *See* Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* 22 (The World Bank Policy Research Working Papers, 2003), *available at* http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3121; Berger, *supra* note 7, at 2.

[170] *See* Hallward-Driemeier, *supra* note 169, at 9 (stating that Japan, the second largest source for FDI by the turn of last century, had only concluded 4 BITs up to 2003. Likewise Brazil, which is one of the top receivers of FDI, has only signed a couple of investments agreements none of which entered into force).

[171] See *generally* Matthias Busse et al., *FDI Promotion through Bilateral Investment Treaties* 24–25 (Kiel Inst. for the World Econ., Working Paper No. 1403, 2008); Hallward-Driemeier, *supra* note 169, at 22; Eric Neumayer & Laura Spess, *Do Bilateral Investments Treaties Increase Foreign Direct Investment to Developing Countries*, 33 WORLD DEV., no. 10, Oct. 2005, at 27, *available at* http://eprints.lse.ac.uk/627/1/World_Dev_%28BITs%29.pdf; Susan Rose-Ackerman & Jennifer Tobin, *Foreign Direct Investment and Business Environment in Developing Countries*: *The Impact of Bilateral Investment Treaties* 23 (Yale Law Sch. Ctr. for Law, Econ., & Pub. Policy, Research Paper No. 293, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121.

respective African partners committed themselves to continue to encourage mutual investment and to push forward negotiations and implementations of bilateral agreements on promoting and protecting investments.[172] This commitment is strong proof for the factual acceptance of BITs as an instrument to foster mutual investment. Especially in the last decade there has been a massive rise in the number of BITs concluded with African countries,[173] showing that China and the African countries seem to believe that international law is an adequate protection for its investors in third-world countries.[174] Nevertheless, Sino-African BITs pose serious and not yet anticipated risks especially to the African continent.

First of all, most investment agreements focus primarily on protecting the interests of the foreign investor and do not take into account the interesst of the international community or the host state with regards to the protections of such areas as human rights or the environment.[175] Sino-African BITs do not address human rights or environmental issues at all. Considering international BIT practice, this is in fact not unusual as there are only a few, newer investment treaties (see for example Art. 1114 (1) of the North American Free Trade Agreement or the China-Canada BIT of 2011) that contain special provisions addressing these issues. However, it would be possible to include special exception clauses to general treaty provisions or to make a reference to human rights concerns and environmental aspects in the preambles of the BITs.[176] Although a preamble does not impose enforceable rights on the contracting parties, it has to be taken into account when interpreting a treaty according to Article 31 of the Vienna Convention on the Law of Treaties. Going even one step further, it would be an option to impose direct obligations on the investors themselves, such as a requirement to comply with the investment laws of the host state when making and operating an investment or obligations in the post-operation stage (e.g. environmental cleanup).[177] However, so far only few BITs (like the COMESA Investment Agreement 2007, Art. 13) contain specific investor obligations.

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172 FOCAC, *supra* note 58, at 4.2.2.

173 *See* United Nations Conference on Trade & Dev., *Full List of Bilateral Investment Agreements Concluded, 1 June 2013*, http://unctad.org/Sections/dite_pcbb/docs/bits_china.pdf (last visited July 19, 2014).

174 Heymann, *supra* note 67, at 526.

175 SORNARAJAH, *supra* note 39, at 259.

176 *See* Dep't of Trade & Indus., S. Afr., *supra* note 142, at 49.

177 DIV. ON INV. & ENTER., UNITED NATIONS CONFERENCE ON TRADE & DEV., *Investment Policy Framework for Sustainable Development* 39 (n.d.), *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf (last visited July 19, 2014).

Second, many African countries have enacted ethnic policies (land redistribution and other schemes) to support those parts of their population that have been disadvantaged due to racial reasons in the past.[178] These policies have a potential to conflict with the BITs in case they include national treatment standards that may require that the best national standards are also given to the foreign investors.[179] Obviously, these provisions that favour the disadvantaged of the community are not meant to fall under the scope of an investment treaty.[180] To avoid this problem, specific exception clauses should be included in all BITs.[181] The national treatment standard can furthermore conflict with performance requirements, which are imposed upon an investor by the host state. Usually a host state in its sovereign power can demand that the investor has to meet certain criteria, for example that he use domestic inputs such as labour and supplies.[182] According to the national treatment clause, host countries cannot give national investors any preferential treatments over foreign investors once they are established in the country and require specific corporate behaviour.[183] With regards to the Chinese practice of refraining from hiring local workers, here the BITs certainly act as a constraint on the government's regulatory freedom.

Third, an emerging principle of International Law, which is often employed in the international trade context, is the principle of special and differential treatment, meaning that developing countries profit from special rights (e.g. longer periods to phase in obligations and more lenient obligations).[184] Expressions of this principle can be found in many international agreements, but rarely in international investment agreements and accordingly not in Sino-African BITs, as bilateral agreements are usually based on "legal symmetry and reciprocity."[185] However, the principle could easily be included through development-focused exceptions from general commitments, a development-oriented interpretation of treaty obligations by arbitral tribunals, or through best endeavour commitments for developing

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[178] *See Basic Guide to Affirmative Action*, DEP. OF LAB. S. AFR., http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-affirmative-action (Last visited July 19, 2014).

[179] SORNARAJAH, *supra* note 39, at 261.

[180] *Id*.

[181] *See* DTI, *supra* note 142, at 37.

[182] DTI, *supra* note 142, at 48.

[183] *Investment Policy Framework for Sustainable Development*, *supra* note 177, at 40.

[184] *See* Definition of the WTO, *available at* http://www.wto.org/english/thewto_e/glossary_e/s_d_e.htm (last visited Feb. 28, 2014).

[185] *Investment Policy Framework for Sustainable Development*, *supra* note 177, at 42.

countries.[186] Surely it would be a very progressive step for the Sino-African BITs practice to adopt the special and differential treatment standard, which is unlikely to happen before other key players in the international investment scene start incorporating it as well.

Fourth, with regards to expropriation, the Sino-African BITs use terms like expropriation or nationalisation that can be found in most standard BITs nowadays. But, what constitutes an expropriation remains unclear and no further definition can be found in any BIT. The same applies to the obligation of "fair and equitable" treatment, which can be found in basically all Sino-African BITs, but does not connote a clear set of legal orders and obligations.[187] Thus, to the extent that foreign investors perceive domestic policy changes to negatively affect their expectations, they might use these provisions to challenge government's measure and claim for compensation.[188] It might be advisable for the African countries against this background to clarify the scope and meaning of the expropriation provisions as well as the fair and equitable treatment clause or to include exception and reservation clauses.[189]

Finally, the dispute settlement clauses of BITs are highly controversial with regards to the potential risks they pose to the host state. Some argue that investors take advantage of these provisions to circumvent domestic legal systems in order to take their cases to more favourable international arbitration.[190] Here, many states fear that issues of public policy are not addressed as comprehensively and prudently as they should.[191] As Chinese investment to the continent grows, also grows the potential for conflicts. Just recently Addax, a Chinese refiner owned by the Sinopec group, sought US $330 million in damages from Gabon in the ICC International Court of Arbitration in Paris, triggering a counterclaim of the Gabon state for double that amount.[192] The dispute mainly focused on the government's allegations that Addax failed to pay customs duties and respect other laws,[193] while Addax blamed Gabon for not renewing its licence.[194]

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[186] *Id.*
[187] Christoph Schreuer*, Fair and Equitable Treatment (FET): Interactions with other Standards*, 4 TRANSNAT'L DISP. MGMT. 26 (2007).
[188] *Investment Policy Framework for Sustainable Development*, *supra* note 177, at 40.
[189] *Id.*
[190] DTI, *supra* note 142, at 45.
[191] *Id.*
[192] Emma Farge, *China's Addax Locks in $ 1 Billion Dispute with Gabon-Sources*, http://www.reuters.com/article/2013/06/05/gabon-china-idUSL5N0E93DB20130605 (last visited Feb. 28, 2014).
[193] Flynn, *supra* note 128.
[194] Farge, *supra* note 192.

Conclusion

Notwithstanding all the criticism, China's engagement in Africa certainly contributes to Africa's economic development and can help to open up the continent and make business more competitive. The cooperation of BRICS members with African nations provides an enormous potential for development of the continent, especially as China attaches an ever-increasing importance to BRICS and its Africa relations. BRICS had a challenging 2013 and is expected to also have a challenging 2014. Critics state that the BRICS have hit a wall in which major emerging markets are suffering.[195] Nevertheless, in 2013 BRICS-Africa trade amounted to nearly $350 billion, which is a significant amount for Africa in relation to its other trading blocs, constituting a 5% increase from 2012.[196]

Chinese investments, in particular, have been growing tremendously during the last decade with the main focus on resource-rich countries like Sudan, Nigeria, and Zambia, as well as South Africa as the leading African economy. Not only is China interested in the raw materials that the African continent has to offer, but it also seeks to exploit Africa's potential as an emerging market with an immense consumer base.

However, it is not certain that Africa profits from Chinese investments. As shown above, the Chinese investments on the continent can also lead to negative side effects such as negative implications for human rights, labour law, and for the environment, as well as detriments for the local economies. From an economic perspective, the sustainability of Chinese investments is very questionable. Most Chinese investments still go into the natural resource sector with the result that many countries are becoming more and more dependent on these resources. If African countries want to make their investment relations with China more sustainable, it is essential that they attract investment in other areas as well. With regards to existing investment, African countries should place more emphasis on performance requirements, for example the participation of local workers in these investment projects, technology transfers, and training of local workers, and should also try to keep the labour-intensive down-stream activities in their respective home countries.

Regarding human rights violations, environmental abuse, and alleged labour law abuse, the onus is placed on the individual African countries. It is crucial that they build up capacities to monitor compli-

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[195] Cf. Michael Schuman, *The BRICs Have Hit the Wall*, *available at* http://business.time.com/2014/01/10/brics-in-trouble/ (last visited Feb. 20, 2014).
[196] Cf. Sapa, *BRICS Economies Not Crashing: Economist*, *available at* http://www.sabc.co.za/news/a/a9c37e0042a6ffa1b579ff56d5ffbd92/Brics-economies-not-crashing:Economist-20142201 (last visited Jan. 20, 2014).

ance and to safeguard the enforcement of respective regulation. In this context it might be advantageous for the African countries to slowly get into a position where they can choose who they want to do business with in the future.

With regards to the Sino-African BIT practice, it might be advisable that the older BITs that were concluded at the turn of the century be revised and renegotiated. One recommendation might be to include more specific language that emphasises the fact that investment promotion and protection should not undermine other important values such as human rights, environmental concerns, and labour concerns, and that investments should always promote sustainable development. More clarification is also needed with regards to such provisions as those dealing with expropriation or fair and equitable treatment. There is still a lot of room for improvement especially with regards to recent developments in international investment treaty design (e.g. the inclusions of investors' obligations and the adoption of the principle of special and differential treatment). Bearing these recommendations in mind, Sino-African investments might become sustainable in the long-run and will be beneficial for China and the African continent at large.